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Three Fallacies of International Criminal Justice – Part One

JANUARY 26, 2019 / RASHMI RAMAN
PERMANENT IS BETTER THAN TEMPORARY

In the wake of the latest chaos at the International Criminal Court over the Laurent Gbagbo decision by the Trial Chamber, it seems a good time to revisit the old debate on the efficacy of the permanent international justice system created by the ICC. Several excellent posts have appeared in the last few days that indicate that the ICC is in crisis. But really, has there ever been a point in the Court's history that it has NOT been in crisis?

Starting from a crippling democratic deficit, the ICC now has a robust membership – granted; but the meaning of this membership is deeply complex. Cases like Ruto in the Trial Chamber and the Appeal by Jordan in the case regarding the arrest of Omar Al Bashir are only two in a large list of instances where being a State party to the Rome Statute has apparently no meaning – since the member states in question – Kenya and the Hashemite Kingdom of Jordan refused to co-operate with the Court.

Contrast this with the clear co-operation and membership mandates of the ad hoc tribunals, now a source of legacy and jurisprudence in international criminal law. They had a clear mandate to co-operate that was the basis of founding the jurisdiction of the tribunal. With the way clear for the concerned states to forge a consensus on the jurisdiction of the tribunal, very little time and effort was expended on requesting co-operation in the framework of the ad hocs. Of course, the hybrid tribunals such as the UNAKRT / ECCC are a separate story of foiled attempts at co-operation despite a consensus. While co-operation of member states is the hallmark of a permanent institution, the ICC has not had much success with its current set of members.

The track record of the two ad hocs remains in impressive contrast with that of the ICC – during its active life from 1995 to 2017, the ICTY indicted 161 individuals of whom 99 were sentenced, 19 acquitted and 13 referred to domestic courts. The ICTR,

during its period of activity, indicted 96 individuals of whom 62 were sentenced, 14 acquitted and 10 referred to domestic courts. Both of these are now succeeded by the UN MICT, in a complex passage of institutional history – that has inherited important pending trials at both tribunals and is also responsible for the fugitives yet to be apprehended by the prosecutorial and investigative mechanism of both tribunals. In contrast, since its entry into force in July 2002, the ICC has had 28 cases, with 34 warrants of arrest issued, 24 acquittals, 8 cases closed, and 4 convictions pending final decisions. In addition the ICC has 11 situations under ongoing investigation. These numbers speak volumes about the co-operation of states parties to the UN and to the ICC. The co-operation of member states used to translate into consensus in the establishment of ad hocs with a clear mandate and an uncontentious founding basis of their jurisdiction – trials moved rapidly to admissibility. Whereas, in this permanent institution, we find stalemate after stalemate – showing that political co-operation cannot be counted on when the institution created by the member states turns around and requests their co-operation in investigations and indictments that might destabilize their own political capital.

The question remains open – is permanent better than ad hoc, really?

My arguments for Fallacies Two and Three follow…

Part Two – International Courts are better than Domestic Solutions

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The second part of my observations on the fallacies of international criminal justice is on the premium placed on “international” and “court” in the international criminal justice system. As an independent observer of the Bangladesh War Crimes Tribunals in Dhaka and through my associations with international tribunals such as the ICTR in Arusha and the ECCC in Phnom Penh, I have wondered whether this systemic preference for institutionalized and international solutions to local conflicts is not at odds with the ultimate end of the justice project – comity among states, the end of a culture of impunity, accountability for individual crimes in a system that aims to foster peace through co-operation.

That institutionalizing this broad vision is a perilous task was already revealed through the Tokyo and Nuremberg Tribunals that loom large in our history – showing the weakness of a political bias for institutionalization that does not enjoy the support and co-operation of states that are made to participate in the exercise. But the lasting

impression of the role of courts that was born out of these historical trials was one of a post facto institution – created to clean up after political events and individual actors had run their course. This is the role that the permanent court is designed to replace – it is not post facto and by saying that it becomes a symbol of endurance and resilience. However, plenty of creative ways can be thought of to make the work of the international court more meaningful to and accessible to the countries and 'situations' it works with. The first of these would be localize the court's presence by creating forms of vertical interactions with existing institutions in the state in question. When this is made impossible by political conditions, a regional version of such vertical interactions may be imagined. Part of the democratic deficit and deep mistrust in the institution is born out of the fractured optics of each trial – with its seat in The Hague and its international judges and lawyers, the court is seen as an outsider to the justice process. Having witnessed the hostility with which the Legacy Project of the UN ICTR is viewed in Rwanda, I think it is important for efforts at international justice to pay close attention to Transitional Justice. A period of conflict, no matter how horrendous, belongs in the history of that state. There is a sense of ownership of stories of human suffering and identity politics born out of terrible crises in human rights – when courts take over the narrative of trying those most responsible for these acts, the effort, no matter how laudable, needs to be related back to those whose lives it has directly impacted. A growing urgency is palpable in the many instances where states refuse to co-operate or honour their treaty commitments under the Rome Statute because the political leadership there is afraid of an international institution co-opting their sovereign right to their own history. Internalizing the elements of transitional justice like memorializing, narrative history, truth telling and embracing creative, customized approaches to each trial could be one way to harmonize the international with the local. Examples like the success of the post-genocidal Gacaca exercise in Rwanda, the TRC in post-apartheid South Africa, the much-maligned purely domestic Bangladeshi War Crimes Tribunal, and failed examples of replicating these tools in Nepal, Myanmar also contain important caveats against placing complete reliance on the local. With hybrid institutions like the ECCC/UNAKRT, SCSL too, there are important lessons in "internationalizing" a fundamentally domestic exercise. What has not yet been truly attempted is "localizing" the international.